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Nos. 526, 527, 528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE STATE CORPORATION COMMISSION OF KANSAS, ET AL., *Appellants*,

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., *Appellants*,

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

ARROW TRANSPORTATION COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Alabama, Northwestern Division

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees, Arrow Transportation Company, State of Alabama, Alabama Public Service Commission, State of Tennessee, Tennessee Public Service Commission, Alabama Farm Bureau Federation, City of Guntersville, Alabama, Guntersville Chamber of Commerce, Chattanooga Area Milk Producers Association, Chattanooga Chamber of Commerce, Knoxville Chamber of Commerce, City of Decatur, Alabama, Decatur Chamber of Commerce, Farmers Union Grain Terminal Association,

Indiana Farm Bureau Cooperative Association, Inc., Tennessee Farm Bureau Federation, and Tennessee Valley Authority, plaintiffs in the District Court, move that the final judgment of that court be affirmed on the ground that the asserted questions presented are so unsubstantial as not to need further argument.

This is a direct appeal from the final judgment and decree of a specially constituted District Court of three judges entered on July 20, 1959, setting aside in part an order of the Interstate Commerce Commission entered March 24, 1959, in the proceeding entitled *American Barge Line Co. v. Alabama G.S.R.R.*, I.C.C. Docket No. 30744, 296 I.C.C. 247, *aff'd*, 303 I.C.C. 463, *modified*, 306 I.C.C. 167. Timely notices of appeal were filed by appellants, and three jurisdictional statements have been filed, one by the appellant State Corporation Commission of Kansas, and other intervening defendants below, in No. 526, one by the appellant railroads in No. 527, and one by the Interstate Commerce Commission in No. 528. This motion is consolidated and directed to all three proceedings.

QUESTION PRESENTED

This case presents the same basic issue that was decided by this Court in *Interstate Commerce Comm'n v. Mechling*, 330 U.S. 567, *James McWilliams Blue Line v. United States*, 100 F. Supp. 66 (S.D.N.Y.), *aff'd*, 342 U.S. 951, and *Dixie Carriers v. United States*, 351 U.S. 56—whether a railroad can lawfully charge more on traffic moving to or from a river port simply because the connecting carrier is a barge line rather than another railroad.

The questions as presented in the jurisdictional statements in Nos. 526 and 528 are identical in content and nearly so in phraseology. Those set forth in the jurisdictional statement in No. 527 vary somewhat from the others in their manner of statement, but their essence is the same. All are predicated upon the common contention of appellants that by the device of joining in the estab-

lishment of a joint through rate, with unpublished agreement as to the division of revenue between them, railroads can with impunity discriminate against connecting barge lines in a fashion which even the appellant Commission concedes they cannot do if the rates are separately published proportionals.

STATEMENT OF THE CASE

The history of this proceeding is set forth in detail in the opinion of the District Court (176 F. Supp. 411, 413-415) and is adequately summarized in the jurisdictional statement of the Interstate Commerce Commission in No. 528.

The traffic involved in this case is the movement of grain from the producing areas of the Midwest to the consuming areas of the Southeast where it serves a rapidly growing livestock and poultry industry. The Tennessee Valley Authority has invested $150 million of federal funds in the improvement of the Tennessee River for navigation and, as shown on the map attached as an appendix, the Tennessee River is now a direct water route by which this grain can move into the heart of the Southeast. The barge rates from the grain origins to the Tennessee River port cities are only a fraction of the rail rates but the savings on the inbound movement evaporate when the grain moves outbound from the port cities by rail. High local rail rates are charged if the grain reaches the port by barge, but if the grain arrives by rail the outbound rail carrier accepts a lower amount as a division of a joint rate although its service on the ex-barge and ex-rail movements is identical.

The discrimination against water transportation under the rate structure which the District Court held unlawful is illustrated on the map attached as an appendix. The example shown is a movement of grain from Kansas City to Chattanooga for storage or processing with a subsequent movement by rail to Orangeburg, South Carolina. The

rate for the rail movement from Kansas City to Chattanooga is 60 cents per hundredweight. The rate for the barge movement is 22½ cents. In either case the bill of lading shows Chattanooga as the destination and the grain is delivered to the same elevator. When the shipper subsequently reships the grain to Orangeburg, the grain is loaded into rail cars on a bill of lading showing Orangeburg as the destination. If the grain arrived at Chattanooga by barge, the shipper is charged the full local rate of 54 cents for the movement to Orangeburg. If the inbound movement was by rail the shipper pays a "transit balance" of 16 cents, which is the balance of the all-rail rate from Kansas City to Orangeburg. The total freight bill for the barge-rail movement is thus 76½ cents per hundredweight as compared with the all-rail rate of 76 cents, and the 37½-cent saving on the inbound barge movement has been completely destroyed.

As noted by the District Court, the compensation received by the outbound railroad may not be the same as the "transit balance" which it collects from the shipper. Its ultimate compensation is on the basis of established divisions of the joint rate and a settlement is made between the inbound and outbound railroads on that basis. The barge lines attempted to obtain for the record the division of the all-rail rate received by the outbound railroad. This evidence is essential to establish the measure of the discrimination against the ex-barge traffic but the Commission refused to receive it. As the Commission states in its jurisdictional statement, the "ultimate question" is whether the Commission was correct in so ruling (p. 9).

The District Court held that any rate-making device which deprives barge transportation of its rightful place in the transportation system or which deprives shippers of the economies resulting from the use of barge transportation is unlawful; that the compensation received by the outbound rail carrier, whether in the form of a separately established proportional rate or as a division

of a through rate, is the yardstick for measuring discrimination against ex-barge traffic; and that evidence of such divisions should have been received.

ARGUMENT

The principles governing this controversy were first established in *Mechling*, which also dealt with rates on grain. There this Court held that the outbound railroad could not charge a higher rate on ex-barge than on ex-rail grain handled under identical conditions. There is no basic difference between this case and *Mechling*.

Although the opinion of this Court in *Mechling* discussed the movements on proportional rates, that case also involved movements on joint through rates with the traffic moving beyond Chicago to the East on a division of the joint rate (*Grain Proportionals, Ex-Barge to Official Territory*, 262 I.C.C. 7, 13). At the time of the *Mechling* case the Commission made no distinction between a division of a joint rate and a proportional rate; stating in its brief to this Court that:

> . . . the difference between a combination of proportionals and a joint rate is one of method of rate making not one of substance . . . [p. 30].
>
> . . . there is no distinction to be made in fact between the charges for transportation from Chicago to the East accruing to the eastern carrier whether they be obtained in the form of a separately established proportional rate or as a division of the joint through rate [pp. 40-41].

The decree of the court below there sustained and affirmed by this Court, struck down and enjoined the Commission's order insofar as that order

> Prescribes, approves, authorizes, or countenances *in any manner whatever* a charge for railroad services in transporting east from Chicago grain that has arrived there by barge that is higher than any rate

or charge that is contemporaneously exacted *in any form or under any guise* for railroad services which do not appear from legally relevant findings of the Commission supported by evidence to be substantially different from railroad services in transporting east from Chicago like ex-rail grain from like origins west of Chicago . . . [Transcript of Record, p. 208; emphasis added].

In its discussion in *Mechling*, this Court said:

> The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. . . .
>
> . . . Congress has decided this question of equitable rates as between railroads and barges. It has declared in unmistakable terms that the "inherent advantage" of the lower cost of barge carriage as compared with that of railroads must be passed on to those who ship by barge. It is therefore not within the province of the Commission to adjust rates, either to equalize the transportation cost of barge shippers with that of shippers who do not have access to barge service or to protect the traffic of railroads from barge competition. For Congress left the Commission no discretionary power to approve any type of rates which would reduce the "inherent advantage" of barge transportation in whole or in part. *Cf. Mitchell* v. *United States*, 313 U.S. 80, 97 [330 U.S. 567 at 577, 579].

The decision in *Dixie Carriers* also is controlling. There, as here, the outbound railroad demanded its full local rate on traffic received from the connecting barge line while accepting a lesser amount as a division of the joint rate on traffic received from its rail connection. Again this Court struck down the Commission's order permitting the

discrimination, stating that "Section 3 outlaws discrimination in all its forms" (351 U.S. at 60).

Appellants seek to distinguish *Dixie Carriers* on the ground that there the barge lines were expressly seeking joint rates, whereas here they seek proportional rates. The appellants are in error as to the relief sought by Arrow Transportation Company in this case. The complaint of the barge lines before the Commission asks that the existing rate structure be declared unlawful and that the Commission prescribe

> ". . . in lieu of the rates presently maintained, such other rates as the Commission may deem reasonable, just, non-preferential, non-prejudicial, and non-discriminatory, and that such other or further order or orders be made as the Commission may consider proper in the premises" [176 F. Supp. at 420, n. 13].

The grain rate structure has been built around the use of proportional rates, and Arrow expected that the relief prescribed would take that form. However, it asked that the discrimination against it be cured in whatever manner the Commission saw fit.[1] As the District Court pointed out:

> ". . . if the Commission deems the establishment of a joint rate for the barge-rail movement rather than ex-barge proportionals to be the appropriate means for ending discrimination, it "has a duty * * * under § 307(d)" to prescribe a joint rate at a level that will preserve intact the "inherent advantages" of water transportation (*Dixie Carriers v. United States*, *supra*, 351 U.S. at page 60 . . .) [176 F. Supp. at 420].

[1] It is clear that neither the barge lines nor the railroads can restrict the Commission's authority to prescribe joint barge-rail rates, even if they desired to do so, as section 307 (d) provides that "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish . . . joint rates . . ."

Appellants apparently confuse the question of whether the existing rate structure is unlawful with the different question of the steps which the Commission should take to cure the unlawfulness. The District Court held only that the existing rate structure was unlawful. It did not attempt to tell the Commission how the unlawfulness should be corrected.

The same confusion is evident in the assertion of appellants in Nos. 527 and 528 that the barge lines are seeking an advantage by the maintenance of their own rates at "local" levels while demanding that the rail carriers accept something less than their "local" rates. The fact is that the barge lines seek nothing of the sort. All they seek, and all that the decision of the District Court would afford them, is that their traffic receive the same treatment by carriers beyond the port as does rail traffic. The *level* of rates, rail or barge, is not here in issue.

The Commission concedes in the very order here under review that where rail rates from the river ports are separately published as proportionals, the railroads cannot charge more for the subsequent movement when the inbound carrier is a barge line than when it is a railroad. However, the appellants argue that the same discrimination is not unlawful if it is accomplished through agreement of the railroads upon joint rates divided between them upon the basis of unpublished divisions. This contention, which was advanced and rejected in *Dixie Carriers*, would, if adopted, emasculate section 3(4) of the Interstate Commerce Act. Under this interpretation, the railroads would need only to eliminate all ex-rail proportional rates to and from the ports and agree among themselves to handle all-rail traffic through such ports on joint rates, in order to accomplish the discrimination which Congress has forbidden. Clearly, a difference in the *form* in which rail rates are published cannot conceal the *substance* of the discrimination which would bar the benefits of water transportation to a large part of the shipping public.

Appellants contend that where the all-rail rates are joint rates the connecting water carriers are not even entitled to know the division which the outbound rail carrier receives for the movement beyond the river port. Obviously, that division, which this Court described in *Dixie Carriers* as "most relevant" (351 U.S. at 61, n. 9) is the starting point in determining the existence and extent of the discrimination against ex-barge traffic.[2] Appellants argue that divisions reflect considerations enumerated in section 15(6) of the Interstate Commerce Act and cannot therefore be used to fix the charges on ex-barge traffic. The District Court did not hold that the amount received by the outbound rail carrier as a division on traffic received from a connecting rail line must *necessarily* be the same as on traffic received from a connecting barge line. It recognized the flexibility which the Act gives to the Commission in fixing divisions. It simply held that joint rates may not be used as a means of accomplishing the discrimination against water carrier traffic which is prohibited by statute and has been condemned by this Court.

> We simply hold that the fact that the inbound carrier is a barge line rather than a railroad is not a factor which may properly be considered in fixing the charge for the outbound rail movement . . . [176 F. Supp. at 419].

The Commission is free under the decision of the District Court to require the establishment of either ex-barge proportional rates or joint barge-rail rates. In determining the charge to be permitted the outbound rail carrier the Commission is free to consider factors that

[2] In the Commission's decision in this case it states that in *Dixie Carriers* "the division of the depressed joint through rail rate received by the carrier performing the service from the barge port to the interior destination was made the measure of the discrimination under section 3 (4) . . ." (306 I.C.C. at 169).

would be relevant if the inbound carrier were a railroad, and to consider any substantial differences there may be in the service required. It is forbidden only to permit the outbound rail carrier to discriminate against its barge connections by exacting a greater compensation for handling traffic received from a barge connection than it exacts on identical traffic handled under identical conditions from a rail connection.

CONCLUSION

WHEREFORE, the appellees respectfully submit that the appellants have presented no substantial question for the decision of this Court, and that the opinion and decree of the District Court should be affirmed.

Respectfully submitted,

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December 14, 1959

Proof of Service

I, Donald MacEay, one of the attorneys for the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of December, 1959, I served copies of the foregoing Motion to Affirm on the several parties to the case as follows:

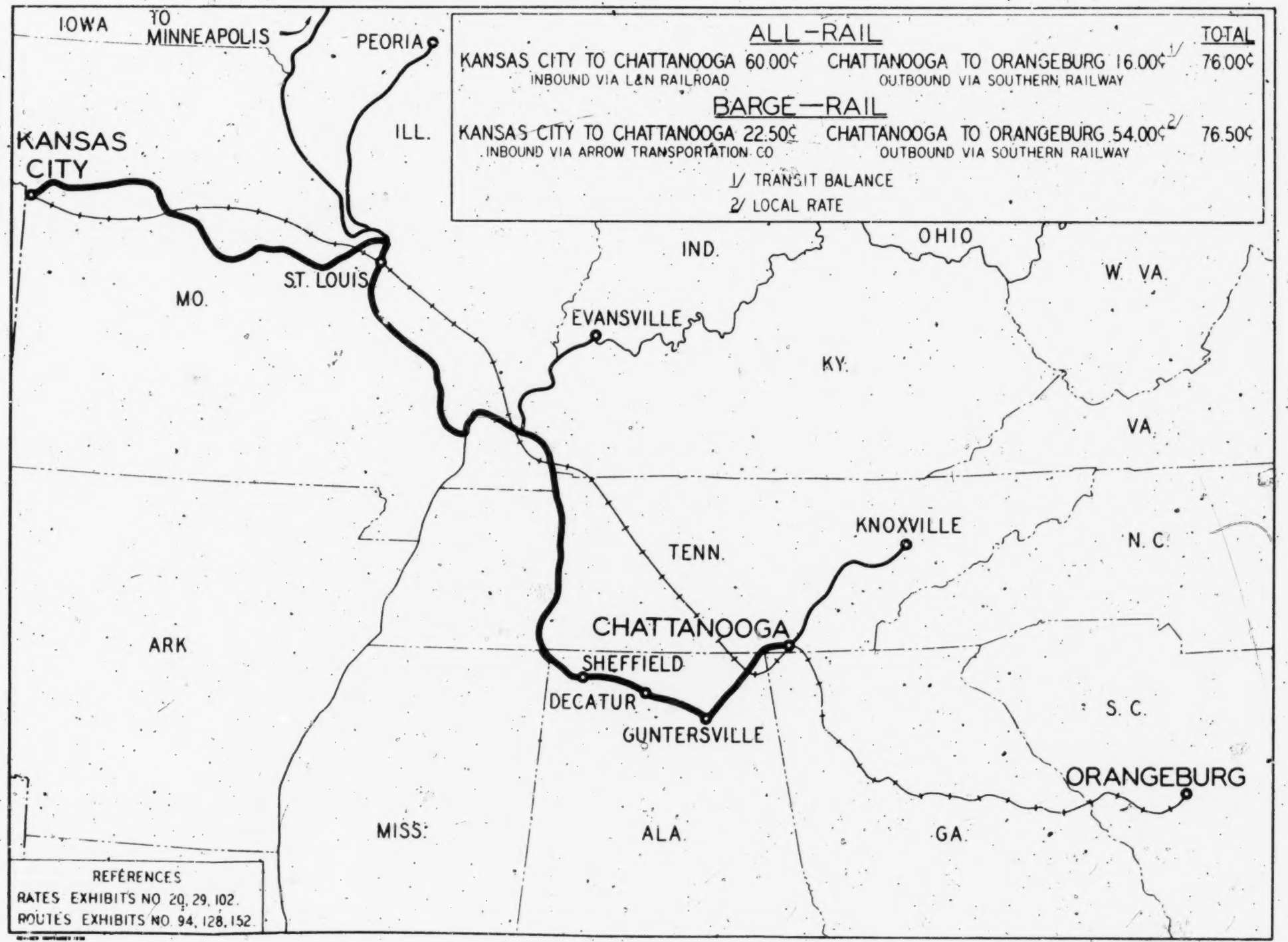
(1) On the State Corporation Commission of Kansas, et al., appellants in No. 526, by mailing a copy in a duly addressed envelope with air mail postage prepaid to Byron M. Gray, Esq., 530 New England Building, Topeka, Kansas.

(2) On the Alabama Great Southern Railroad Company, et al., appellants in No. 527, by mailing copies in duly addressed envelopes with air mail postage prepaid to R. W. Hengiott, Esq., 908 W. Broadway, Louisville 1, Kentucky, and M. L. Cassell, Esq., 139 W. Van Buren Street, Chicago 5, Illinois.

(3) On the Interstate Commerce Commission, appellant in No. 528, by mailing copies in duly addressed envelopes with first class postage prepaid to Robert W. Ginnane, Esq., General Counsel; and Isaac K. Hay, Esq., Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

(4) Upon the United States of America, statutory defendant in District Court, by mailing a copy in a duly addressed envelope with first class postage prepaid to Hon. J. Lee Rankin, The Solicitor General, Department of Justice, Washington 25, D. C.

DONALD MACEAY


ALL-RAIL
KANSAS CITY TO CHATTANOOGA 60.00¢
INBOUND VIA L&N RAILROAD
CHATTANOOGA TO ORANGEBURG 16.00¢ 1/
OUTBOUND VIA SOUTHERN RAILWAY
TOTAL 76.00¢
BARGE—RAIL
KANSAS CITY TO CHATTANOOGA 22.50¢
INBOUND VIA ARROW TRANSPORTATION CO
CHATTANOOGA TO ORANGEBURG 54.00¢ 2/
OUTBOUND VIA SOUTHERN RAILWAY
TOTAL 76.50¢
1/ TRANSIT BALANCE
2/ LOCAL RATE
IOWA
TO MINNEAPOLIS
PEORIA
ILL.
KANSAS CITY
ST. LOUIS
MO.
IND.
OHIO
W. VA.
EVANSVILLE
KY.
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REFERENCES
RATES EXHIBITS NO 20, 29, 102.
ROUTES EXHIBITS NO. 94, 128, 152.